

- SUBJECT:** Cause of action for bringing retaliatory SLAPP suits
- COMMITTEE:** Civil Practices — favorable, without amendment
- VOTE:** 7 ayes — Bosse, Janek, Dutton, Hope, Martinez Fischer, Smithee, Zbranek
1 nay — Clark
1 absent — Nixon
- WITNESSES:** For — Tom Blackwell; Alan Winston Smith
Against — None
- BACKGROUND:** A “strategic lawsuit against public participation” or SLAPP suit is a suit brought against someone who makes a report or complaint to a governmental entity (complainant) by the person or corporation reported or complained of (complainee) because of the complaint or report.

Government Code, chapter 81, subchapter E, outlines the jurisdiction of the Texas Supreme Court and the State Bar of Texas in attorney disciplinary matters. Chapter 82 addresses licensing and provides for disbarment under certain conditions.
- DIGEST:** **Rules for suits against complainants.** HB 2723 would establish rules for suits claiming damages based on a complaint or report made to a governmental entity — for example, a libel or slander suit.

Such a suit would have to be brought in the district court of the complainant’s home county or, if the complainant did not live in or have an office in Texas, in the county in which the complaint to the governmental entity was made.

The complainee who sued the complainant for filing a complaint could not make general allegations but would have to plead specific facts giving rise to the suit and that would entitle the complainee to the relief sought, including facts indicating that the complainant did not act in good faith. The facts

alleged in the complainees' petition also would have to be sworn to as the personal knowledge of the complainees or made part of the petition by attaching documents to the petition that supported the facts alleged in the petition. The complainant could request that the court check the complainees' petition for whether the complainees had complied with these requirements, or the court could check on its own. If review of the petition showed that the complainees had not pleaded sufficient facts to support the cause of action, the court would have to issue a summary judgment on the suit promptly.

The complainant would have a defense to the complainees' lawsuit and could not be liable for damages or subject to injunctive relief if the complaint was brought in good faith. The bill would establish a presumption of good faith that the complainees would have to rebut. Good faith could be shown by proving that a reasonable person in the same position could have believed that a reasonable basis in fact existed for the complaint and that the governmental entity complained to had jurisdiction of the complaint. The court would have to issue summary judgment on the suit promptly if the complainant showed that the complaint was made in good faith.

If the complainant received a judgment that the complaint was made in good faith, the complainees would have to pay the complainant's attorney's fees and costs. A court could not enjoin a complainant from communicating with a governmental entity about the subject of the complaint.

Liability of complainees. HB 2723 would make a complainees who sued a complainant for making a complaint liable for damages and subject to injunctive relief if the complainant proved his or her own good faith in making the complaint and that the complainees had harassed or caused another person to harass the complainant to:

- ! have the complaint dismissed;
- ! prevent or limit the complainant from participating in a formal or informal governmental investigation of or proceedings regarding the complaint;
- ! prevent the complainant from making the complaint; or
- ! retaliate against the complainant for the complaint.

The bill would define harassment as an act intended or reasonably calculated to intimidate, threaten, coerce, or mislead a complainant through physical force, injury to personal or business reputation, invasion of the right to privacy, economic damage or severe emotional distress, known false statements about the complaint, or violation of the constitution or penal law of any state or of the United States.

A complainant who proved the above would be entitled to recover damages, attorney's fees, court costs, and exemplary damages of five times attorney's fees and costs from the complaine.

A complainant also could sue the complaine and the complaine's attorney(s) for bad faith. If the court or jury found that a complaine had acted in bad faith when it sued the complainant about the complaint, the complainant would be entitled to judgment for actual damages, attorney's fees, court costs, and exemplary damages of five times the amount of attorney's fees and costs for which both the complaine and the complaine's attorney(s) were jointly and severally liable. The bill would define bad faith as:

- ! bringing a claim that had no basis in fact or law or that could not be argued in good faith as an extension, modification, or reversal of existing law;
- ! bringing a claim to harass or intimidate a complainant; or
- ! bringing a claim to obtain withdrawal of a complaint.

An attorney against whom a bad faith judgment was entered would be subject to professional discipline and to suspension or disbarment under the Government Code. The court would have to report the attorney's name with a copy of the factual findings and the judgment to the appropriate grievance committee.

These provisions would not apply to a complaint that was made confidential by law, but that the complainant disclosed to someone other than the governmental entity. Nor would it apply where the complainant was or had been an employee of the complaine. The bill would not create a cause of action against a governmental entity nor require the state to indemnify its agents.

The bill would take effect September 1, 2001, and would apply only to claims filed on or after that date.

SUPPORTERS
SAY:

SLAPP suits often are brought against those who report wrongdoing to or cooperate with the government in investigating violations of law or of administrative regulations. They often are used to harass citizens into not communicating with their government.

Many instances of these suits have occurred in Texas. In one case, a witness in a federal proceeding that resulted in agency action against the complainees was harassed, threatened, and eventually sued and subjected to an *ex parte* restraining order preventing the witness from communicating with the federal prosecutors. In another case, a jeweler who cooperated with federal customs officials regarding a smuggling case was sued for restraint of trade and spent more than four years in litigation.

Such suits discourage citizens from helping the government enforce the law by forcing them to spend thousands of dollars in legal fees. If the state wants people to do their civic duty, the state must protect these citizens, as other states have done, when they do that duty in good faith. By providing quick disposition of SLAPP suits and awarding attorney's fees to good faith complainants who have been harassed by a complainees, the state could protect the right to communicate with one's government, as well as the government's interest in receiving citizens' complaints.

HB 2723 would discourage groundless SLAPP suits by punishing the complainees who use them and the attorneys who bring them on a complainees' behalf. The punishment of five times attorney's fees would be appropriate, because it would be tied directly to the harm that the complainees had caused through the groundless SLAPP suit. However, only complainees who harass complainants get penalized; and harassment does not include a suit brought to prove that the complaint is false.

OPPONENTS
SAY:

HB 2723 would not strike a fair balance between the right of a person or business who was the subject of a complaint to vindicate itself and the right of the complainant to make a legitimate complaint.

The bill's definition of good faith is so broad that it would be almost impossible to prove that the complainant had acted in anything other than good faith. Moreover, placing the burden on the complaine to file sworn pleadings that offered facts showing that the complainant was in bad faith would be too onerous, given that only the complainant could know the motives, reasons, and facts that led to the complaint. This effectively would eliminate almost every cause of action against a complainant for making a complaint, no matter how false, because even if the complainant's lack of good faith could be shown through gathering of evidence, this bill would not allow the complaine even to get into that process.

NOTES:

Similar legislation was filed in the past three legislative sessions. In 1995, HB 2967 by Raymond passed the House on the Local and Consent Calendar but was tagged in the Senate State Affairs Committee. In 1997, HB 1319 by Raymond was reported favorably by the House State Affairs Committee and placed on the General State Calendar but died there. In 1999, HB 2488 by Tillery passed the House but died in the Senate Jurisprudence Committee.